STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 35-2004:

ST. IGNATIUS LOCAL CHAPTER NO. 3182, MEA-MFT (NEA-AFT),	)	Case No. 2611-2004
Complainant,	)	
vs.	)	
ST. IGNATIUS SCHOOL DISTRICT NO. 28,	)	
Defendant.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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I. INTRODUCTION

On June 1, 2004, the St. Ignatius Local Chapter No. 3182, MEA/MFT, filed a charge with the Board alleging that St. Ignatius School District No. 28 had committed an unfair labor practice by engaging in regressive bargaining, insisting on a two-year agreement late in the bargaining process, implementing unilateral changes to existing wages and working conditions in the absence of a genuine impasse, and declining to meet with the union. On June 23, 2004, the district filed a response to the charge denying that its actions constituted an unfair labor practice.

On September 1, 2004, an investigator for the Board issued a finding that the charges had probable merit and transferred the case to the Hearings Bureau for a hearing on the charges.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on January 11, 2005. Karl J. Englund represented Local 3182. Debra A. Silk represented the district. Tom Gigstad, Tim Marchant, Tim Biggs, John Ligas, Tim Skinner, Jim Udall, David Castor, and Stacy Cummings testified. Exhibits 1 - 22, 25, A, G, K, L, S, Z, and BB were admitted by stipulation of the parties. Exhibits 19, 23,

24, 26, D, E, I, N, O, P, V, Y, AA, EE, FF, GG, II, LL, NN, OO, PP, QQ, and RR were also admitted.

The parties filed post-hearing briefs on February 11 and 14, 2005. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether St. Ignatius School District No. 28 committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the complaint filed by the St. Ignatius Local Chapter No. 3182, MEA/MFT.

III. MOTION TO AMEND THE UNFAIR LABOR PRACTICE CHARGE

On February 23, 2005, Local 3182 filed a motion to amend the unfair labor practice charge to conform to the evidence. On March 8, 2005, the district filed a brief in opposition to the motion. On March 14, 2005, Local 3182 filed a reply brief on the motion.

Local 3182 seeks to amend the charge to conform to the evidence presented at hearing concerning its contentions about events that occurred on June 9, 2004, June 22, 2004, and July 27, 2004. The district contends that it would be unfairly prejudiced by the amendment of the charge, that these events occurred after the filing of the charge and should have formed the basis for a separate charge, or that the union should at least have been required to file an earlier amendment. The district also objected at hearing to the admission of the evidence forming the basis for the proposed amendment on the grounds of relevance, and the hearing officer overruled the objections.

The motion, although superfluous, is granted. Local 3182 included the language proposed for inclusion in the charge in its prehearing contentions exchanged with the district on December 30, 2004. The identical contentions were incorporated into the final prehearing order, which also stated, at page 15:

> This order *substitutes for the pleadings* in this case and is the standard of relevance at hearing. This order determines the scope of permissible

testimony, exhibits and other evidence, except for good cause shown or because exclusion of the evidence would result in manifest injustice.

(Emphasis added).

The district consented to the prehearing order by signing it at the commencement of hearing, did not make any exceptions to the prehearing order on the record, and did not seek a continuance based on the inclusion of the contentions in the prehearing order. Therefore, the charge was effectively amended by the prehearing order, and the district waived any objection to the amendment. Further, because of the prehearing exchange of contentions, the district was on notice prior to the commencement of hearing that Local 3182 alleged the continuation of the unfair labor practice. Because the district was on notice of these contentions prior to the hearing, it cannot demonstrate unfair prejudice. Amendment of the charge to conform to the evidence is proper under these circumstances. *Armbrust v. York*, ¶18, 2003 MT 36, 314 Mont. 260, 65 P.3d 239.[1]

IV. FINDINGS OF FACT

1. St. Ignatius School District No. 28 is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

2. St. Ignatius Local Chapter No. 3182, MEA-MFT (Local 3182), is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6), and is the certified exclusive bargaining representative for the certified staff employed by the St. Ignatius School District No. 28.

3. The district and Local 3182 have been parties to a series of collective bargaining agreements. During the period 1993 to 2003, all but one of the agreements were for one-year periods. The agreement for the 2001-02 school year was finalized on November 20, 2001. The agreement for the 2002-03 school year was finalized on February 25, 2003. The agreement for the 2002-03 school year contained, among other things, the following provisions that are relevant to this case:

[1]Even had the contentions not been included in the prehearing order, the evidence of a continuing refusal by the district to bargain with the union was relevant to the overall question presented by the charge, and properly admitted into evidence.

a. A pay matrix;
b. Insurance paid by the district in an amount not to exceed $3,875.00;
c. Longevity pay for teachers employed over 15 years and additional pay for teachers employed over 19 years;
d. Certain rights for non-tenured teachers including the right to receive specific reasons for contract non-renewal (Article 7.1);
e. A provision giving laid-off teachers "first consideration" for vacancies and requiring that they be recommended by the superintendent if they meet qualifications (Article 9.2);
f. Three days of paid personal leave;
g. Work hours of 8:00 a.m. to 3:40 p.m., Monday through Thursday and 8:00 a.m. to 2:25 p.m. on Friday.

4. In May 2003, the parties began negotiations for a successor agreement. The negotiators for Local 3182 were Tim Marchant, Tim Biggs, and John Ligas, teachers employed by the district. The district negotiators were Jim Udall and Dave Castor, members of the school board. Tim Skinner, district superintendent, also participated in the negotiations. Local 3182 presented the first proposal to the district on May 28, 2003. It proposed a one-year contract covering the 2003-2004 school year. It proposed a base salary increase of 3.9%, increases in the longevity pay and an increase of $90.00 per month for insurance.

5. The district presented its initial proposal at the next bargaining session, held on or about June 3, 2003. The district proposed a one-year contract containing a 1.8% increase in salary, no increase in longevity pay and no increase in insurance payments. The district proposed deleting the Article 7.1 requirement that non-tenured teachers be notified of the specific reasons why their contracts are not renewed. The district proposed that laid-off teachers be "considered" for vacancies (eliminating the Article 9.2 requirement that they receive first consideration and be recommended by the superintendent if they meet qualifications). The district proposed that employees take personal days only two at a time. Finally, the district proposed extending the work day to 8:00 a.m. to 4:00 p.m., Monday through Friday.

6. The parties met again on June 11, 2003, during which no proposals were exchanged.

7. The parties met again on June 17, 2003. Local 3182 made a second proposal in which it reduced its initial proposal by $10.00 per month for insurance (from $90.00 per month to $80.00 per month). It renewed its proposals concerning salary and longevity increases and rejected the district's proposed language changes.

8. The parties met again on July 23, 2003. The district made a second proposal containing the same economic proposal as that contained in the district's first proposal. It changed its proposal to amend Article 7.1 to provide that the contract's provisions regarding non-tenured teachers would not apply to teachers in their first two years of service with the district. It did not change its proposals on Article 9.2, personal leave, or work hours.

9. The parties met again on September 8, 2003. Local 3182 made a third proposal (dated September 2, 2003) in which it reduced its second proposal by $10.00 per month for insurance (from $80.00 per month to $70.00 per month). It renewed its proposals concerning salary and longevity increases and rejected the district's proposed language changes.

10. The parties met again on September 22, 2003. The district made a third proposal in which it offered a 2.5% pay increase, and no increase in either insurance or longevity. The district dropped its proposal to change the hours of work and to restrict the use of personal leave. The district renewed its original proposal on Articles 7.1 and its last proposal on 9.2.

11. The parties met again on October 1, 2003. Local 3182 made a fourth proposal in which it reduced its third proposal by $9.50 per month for insurance (from $70.00 per month to $61.50 per month). It also reduced its proposal for increases in longevity pay. It renewed its salary proposal and rejected the district's proposed language changes.

12. The parties met again on October 8, 2003. The district made a fourth proposal in which it offered a 3% pay increase. The district renewed its proposals on Articles 7.1 and 9.2.

13. During its October 21, 2003, Board of Trustees meeting, the Board discussed offering either a 3.9% pay increase coupled with the language changes concerning non-tenured teachers and laid-off teachers or a 3% pay increase with no language changes. The Board decided to continue to pursue its previous proposals.

14. The parties met again on October 31, 2003. Local 3182 made a fifth proposal in which it reduced its fourth proposal by $8.50 per month for insurance (from $61.50 per month to $53.00 per month). It renewed its proposal for a 3.9% salary increase and its fourth proposal for increases in longevity pay. It rejected the district's proposed language changes.

15. Sometime after the October 31, 2003, session, the district retained Stacy Cummings of the Montana School Board Association as a negotiator for the Board. For reasons that are not explained in the record, the district cancelled two bargaining sessions that had been scheduled in November. The union team attempted to set a bargaining session for December 11, 2003, but Cummings was unavailable. No additional bargaining took place during 2003.

16. Section 29.1 of the 2002-03 collective bargaining agreement provided that the contract would automatically renew for a period of one year if neither party gave written notice of its desire to renegotiate during the month of December of the year the contract expired. On December 2, 2003, Local 3182 submitted a written request to the district for the initiation of contract negotiations for the 2004-05 school year.

17. The parties met again on January 8, 2004. At this meeting and the following meetings, Cummings was the district's chief spokesperson and the union's chief spokesperson was MEA-MFT field consultant Tom Gigstad. At the January 8 meeting, the district made a fifth proposal in which it proposed for the first time a two-year contract. It offered a 3% salary increase in the first year and 0% increase in salary in the second year. It offered no increase in insurance or longevity. It changed its offer on Article 7.1 by proposing that its provisions regarding non-tenured teachers apply to all non-tenured teachers, except the requirement for specific reasons for non-renewal, which it proposed would apply only to teachers in their third year with the district. It also offered to grandfather teachers hired before the 2004-2005 school year ("Teachers hired before the 2004-2005 school year are entitled to reasons for non-renewal . . ."). It renewed its offer that laid off teachers be "considered" for vacancies.

18. During all negotiations prior to January 8, 2004, the parties had assumed that any salary increase agreed to would be retroactive to the beginning of the 2003-04 school year. The district's January 8 proposal provided that retroactivity was "subject to negotiations."

19. During the discussion that followed the district's presentation of its January 8, 2004, proposal, Local 3182 maintained that the offer was inconsistent with the Board of Trustees October 21, 2003, decision and that it was, in the union's opinion, regressive, especially with respect to the question of retroactivity. Local 3182 also protested the district's proposal for a two-year contract so late in the negotiation process. It asserted that a two-year contract made the negotiation process

more difficult because the union might want language changes in a two-year contract that it was willing to forego in a one-year contract.

20. In response, the district made a sixth proposal on January 8, 2004, which was identical to its fifth proposal except that it provided for a 1% pay increase in the second year of the contract.

21. The parties met again on February 5, 2004. Local 3182 made its sixth proposal, which it gave to the district at 7:30 p.m., in which it reduced its fifth proposal by $1.00 per month for insurance (from $53.00 per month to $52.00 per month). It renewed its proposal for a 3.9% salary increase and its previous proposal for increases in longevity pay. Local 3182 argued against the district's two-year offer. It explained that given what it considered to be the late day on which the district injected the two-year issue, trying to reach agreement on a two-year contract would extend the already extended negotiations. It again asserted that it was willing to forego language changes in a one-year deal that it was not willing to forego in a two-year deal.

22. In response, the district made its seventh proposal at 8:35 p.m. It characterized the proposal as a "package proposal" which it described as meaning that if the union chose to modify, delete or reject any part of the package, the district reserved the right to revert to its previous proposal. In the "package proposal," it offered pay increases of 3.9% in the first year and 1.3% in the second year of the contract and offered that under Article 9.2, laid off teachers be "given first consideration" for vacancies (proposing to eliminate the requirement that they be recommended by the superintendent if they meet qualifications). It maintained the two-year term and the district's initial proposal on Article 7.1. It eliminated the provision making retroactivity subject to negotiation.

23. After receiving the district's seventh proposal on February 5, the union's negotiating team believed they would be unable to conclude negotiations that night. Gigstad and Cummings had a conversation (a "sidebar") in which Gigstad conveyed his conclusion that further progress that night would be unlikely. He proposed reconvening negotiations on February 23, 2004. Both negotiators returned to their respective caucuses. The union's team waited for a response to the proposal to resume negotiations on February 23, 2004. Cummings conveyed to the district's team that they were done. The district's team left the building without responding to the proposal to resume negotiations on February 23. Another employee working in the building eventually told the union's team that the district's team had left the building.

24. On February 6, 2004, Cummings, on behalf of the district, filed a request with the Board for mediation assistance. On February 9, 2004, the Board assigned Paul Melvin as mediator.

25. The parties participated in a mediated bargaining session on March 22, 2004. Melvin first met separately with each of the bargaining teams. He then conducted the mediation session by relaying proposals and "supposals" between them. Supposals were conceptual suggestions designed to explore whether room for movement existed on particular topics.

26. At the outset of the mediated bargaining, Local 3182 made a seventh proposal in writing in response to the district's package proposal of February 5, 2004. It reduced its insurance proposal by $2.00 per month (from $52.00 per month to $50.00 per month) and agreed with the district's seventh proposal for changes in Article 9.2. It retained its proposals for a 3.9% salary increase, for longevity, and for a one-year term. It rejected the district's proposal for changes to Article 7.1.

27. Melvin conveyed a supposal to the Local 3182 bargaining team in response to its seventh proposal. This supposal was for a two-year agreement that could be reopened in the second year for language changes only, increased salary of 3.9% in the first year and 1.3% in the second year, and retained the district's last proposals for language changes in Articles 7.1 and 9.2. The union negotiating team rejected the proposal for a reopener for language only in the second year and maintained its objections to a two-year agreement. Melvin then conveyed a supposal from the district for a one-year agreement, 3.9% salary increase, no change in the language of Article 9.2, and the district's last proposed language change in Article 7.1. Cummings's notes of the session at this point reflect a discussion of "last, best, and final" ideas. After this, the mediation session concluded.

28. On March 25, 2004, Cummings reported to the district's negotiation team her view that the mediation session on March 22 had been productive. She stated, "the union and the board attempted to move toward agreement. The board offered to drop their proposal on a two-year contract and go with a one year; the union fundamentally discussed the changes in 9.2. . . ."

29. The parties participated in a second mediated bargaining session on April 13, 2004. Initially, Local 3182 responded to the district's last supposal by proposing a one-year agreement with a 3.9% salary increase, dropping its requests on insurance and longevity altogether, and proposing no change in the language of Article 7.1. The union's negotiators had been confused by the district's suggestion of

no change in the language of Article 9.2, and indicated they would accept either the current language or the district's last proposal on 9.2, which the union had accepted.

30. The district responded by relaying a supposal for a two-year agreement, salary increases of 3.9% in the first year and 1.3% in the second year, an increase of $25.00 per month in the health insurance contribution, no change in the language of Article 7.1, and the language change in Article 9.2 that the union had earlier accepted.

31. Local 3182 countered by having Melvin relay a supposal for a one-year agreement, a 3.9% salary increase, no changes in insurance or longevity, no change in the language of Article 7.1, and the language change in Article 9.2 that the union had earlier accepted.

32. Melvin returned, indicating the district was close to a "last, best and final offer." He asked the union to consider a two-year agreement with salary increases of 3.9% in the first year and 2.5% in the second year, no increase in insurance, and the district's proposal on Article 7.1. The union negotiators asked Melvin to sound the district out on another proposal for a two-year agreement with salary increases of 3.9% in the first year and 4.4% in the second year, and no change in Article 7.1.

33. The district responded with what it called its "last, best and final offer." That offer was for a two-year contract with pay increases of 3.9% in the first year and 2.5% in the second year, and no increase in insurance or longevity. The district renewed its offer concerning third-year teachers receiving specific reasons for non-renewal, but did not re-propose the grandfather provision. Finally, the offer proposed that laid off teachers be given first consideration for vacancies. The union was informed that if it did not notify the district of its ratification of the offer by 8:00 a.m. on April 30, 2004, the proposal would be unilaterally implemented.

34. The parties were not at impasse when the district made its last, best and final offer.

35. On April 23, 2004, the union, through Gigstad, wrote a letter to the district superintendent stating that the union did not agree to the district's April 13 offer and asserting that the parties were making progress toward an agreement and that there "is room for further movement." Gigstad wrote that "impasse does not exist" and thus "any attempt to unilaterally implement the changes addressed in the District's offer would be an Unfair Labor Practice." Like he had done at the

bargaining table, Gigstad reiterated that if the district "intends to insist upon its 11th hour demand for a two-year agreement," the Union would present issues it felt it needed to address in the second year of the contract. Finally, Gigstad requested a bargaining session.

36. In response, Cummings wrote to Gigstad on April 26, 2004, stating that the district's offer would be implemented unless agreed to prior to the end of business on April 29, 2004. Cummings mischaracterized the bargaining to that point by stating that the parties had been bargaining since March 2003, and that the union had not made a written proposal since February 5th. Cummings did not agree to a bargaining session. Instead, she wrote:

> You are welcome to submit a proposal in writing to me and to the mediator, Paul Melvin, through the district superintendent via fax or email. The superintendent will accept any proposal submitted in person if you choose that venue. Once we receive a proposal we will convene the negotiation team and consider your offer. . . . Should we receive an offer we will consider it, however, understand that we have exhausted our parameters.

37. On April 27, 2004, Marchant, on behalf of Local 3182, requested that the district issue the retroactive pay increase for the 2003-04 school year in checks to the teachers separate from their regular payroll checks.

38. Also on April 27, 2004, the district notified all teachers that on April 30, 2004, it would implement changes to the collective bargaining agreement. The notice then detailed the changes which were consistent with the district's offer of April 13, 2004. Those changes in wages and working conditions detailed in the district's offer of April 13, 2004, were, in fact, implemented on April 30, 2004.

39. On June 9, 2004, the union, by letter from union president John Ligas to the chair of the district's board of trustees, requested face-to-face negotiations.

40. On June 22, 2004, the parties met for what the union thought was to be a negotiating session. Local 3182 presented a two-year offer (for the 2003-04 and 2004-05 school years), including approximately 20 language items for 2004-05.

41. On or about July 27, 2004, the district's spokesperson stated that it had implemented a two-year contract, that it had no obligation to bargain during the term of that "contract," that it had no obligation to bargain about the wages, hours and

terms and conditions of employment for either of the years for which it implemented a "contract" and that it was not interested in bargaining during the term of that "contract." The district refused to bargain with the union about either retroactive changes for the 2003-04 school year or for prospective changes for the 2004-05 school year. The district refused to set a date for another bargaining session.

V. DISCUSSION[2]

Montana law requires public employers and labor organizations representing their employees to bargain in good faith on issues of wages, hours, fringe benefits, and other conditions of employment. Mont. Code Ann. § 39-31-305(2). Failure to bargain collectively in good faith is a violation of Mont. Code Ann. § 39-31-401(5). A violation of Mont. Code Ann. § 39-31-401(5) is also considered a "derivative" violation of Mont. Code Ann. § 39-31-401(1). ***See*** Hardin, *The Developing Labor Law*, 3rd Ed. 1992, at 75. The Board of Personnel Appeals can properly use federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The basic, fundamental purpose of labor relations is the good faith negotiation of the mandatory subjects of bargaining--wages, hours, and other terms and conditions of employment. For an employer to make unilateral changes during the course of a collective bargaining relationship concerning mandatory subjects of bargaining is a violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. However, when the parties have bargained to an impasse, the employer may unilaterally change terms and conditions of employment, so long as these changes are consistent with offers that the union has rejected. *United Paperworkers International Union, AFL-CIO, Local 274 v. Champion International Corp.* (8th Cir. 1996), 81 F.3d 798, 802.

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining

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[2]Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

existed. *Taft Broadcasting Co.* (1967), 163 NLRB 475, ***aff'd sub nom***. *American Federation of Television and Radio Artists v. NLRB* (D.C. Cir. 1968), 395 F.2d 622. Impasse is a defense to a charge of illegal unilateral change, and the party asserting impasse has the burden of proof on the issue. *North Star Steel Co.* (1991), 305 NLRB 45, *enf'd* (8th Cir. 1992), 974 F.2d 68.

Central to a determination of the issues in this case is an understanding of what the district implemented. It maintained, in declining to entertain further bargaining with respect to the 2004-05 school year, that it had imposed a two-year agreement, relieving it of any further bargaining obligation. Aside from the fact that "imposing agreement" is an oxymoron, no agreement existed for the district to impose. In the absence of agreement, the district did three things on April 30, 2004. First, it imposed unilateral changes to working conditions for the 2003-04 school year. Second, it announced unilateral changes for the 2004-05 school year that it planned to implement at the beginning of that school year. Third, it declined to bargain further about these conditions of employment, including those to be implemented in the future.

The district has failed to prove that the parties were at impasse when it took these actions. After the first mediated bargaining session on March 22, 2004, the district's negotiator reported that the session had been productive, that the district was willing to consider a one-year agreement, and that the union had fundamentally discussed the district's proposal for Article 9.2. As to the majority of the terms implemented by the district on April 30, 2004 for the 2003-04 school year, the parties were in essential agreement. At the commencement of the second mediated bargaining session on April 13, 2004, Local 3182 proposed a one-year agreement, a 3.9% increase in base salary, dropped its requests for increases in insurance and longevity, sought no change in the language of Article 7.1, and indicated its agreement to either current language or the district's last proposal on Article 9.2. The district responded with a supposal for a two-year agreement, an increase in base salary of 3.9% in the first year and 1.3% in the second year, an increase in the insurance contribution of $25.00 per month, *no change in the language of Article 7.1*, and the district's last proposal on Article 9.2.

Clearly, the question of the willingness of the parties to compromise on the language of Article 7.1 is key to determining whether the parties were at impasse. The finding that the district "supposed" no change in the language of Article 7.1 in the April 13, 2004, session is based on the testimony of Gigstad, and suggests that there remained room for compromise on this question. Although there was a conflict in testimony between Gigstad, who said that Melvin relayed a supposal of no change

in Article 7.1, and Cummings, who denied that the district ever indicated willingness to compromise on the Article 7.1 language change, the testimony of Cummings was not credible on this point. Her notes of the bargaining session, admitted into evidence as defendant's Exhibit GG, identify the supposal conveyed by Melvin at that point in the bargaining as "TS idea" and contain no reference to the Article 7.1 language, thus supporting Gigstad's version of events. Although Cummings testified on cross-examination that the failure to list Article 7.1 among the items conveyed at that time was simply an error in her note-taking, her testimony was not credible. It is more probable, viewing the evidence as a whole, that the district indicated a willingness to compromise on Article 7.1 at that point in the mediation.

Because the district indicated a willingness to compromise on Article 7.1, it is likely that continued negotiations would have produced agreement. With respect to the other items being negotiated for 2003-04, the parties were in agreement. With respect to the 2004-05 negotiations, the history of bargaining does not support a finding that the parties were at impasse. The parties had held only two face-to-face negotiation sessions before the district determined the parties were not making adequate progress and sought mediation, all the while delaying further face-to-face negotiations. During the two sessions, the union resisted even discussing 2004-05 on the grounds that it wanted to conclude the 2003-04 negotiations before turning to the subsequent year. There simply was inadequate bargaining over 2004-05 for there to have been impasse.

In view of these facts, the factors of bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations, do not support a finding of impasse. The parties were not at genuine impasse when the district implemented its last, best and final offer.

Whether or not the parties were at impasse, the fact that the negotiations stalled was due to the bad faith bargaining on the part of the district. For reasons that are not adequately explained in the record, after October 31, 2003, the district engaged in a pattern of conduct certain to frustrate the negotiations. Thus, if impasse existed, it was tainted by the district's bargaining conduct and was not valid. ***See, e.g.,*** *Alwin Mfg. Co. v. NLRB* (D.C. Cir. 1999), 192 F.3d 133, 137-38.

From the time negotiations commenced in late May 2003 through October 31, 2003, the parties had bargained and appeared to be making progress on a one-year agreement. The union had steadily reduced its economic proposal. The district had

increased its economic proposal and dropped several of its proposed language changes. The district then decided to engage the services of Cummings, a professional negotiator.

After October 31, 2003, the character of the negotiations changed radically. The district cancelled negotiation sessions scheduled for November 2003, and was apparently unable to meet in December due to conflicts in Cummings's schedule. After a more than two-month hiatus, when the parties reconvened on January 8, 2004, the district demanded to bargain for a two-year contract rather than a one-year contract. It also raised the issue of retroactivity for the first time. The district then parlayed the union's reluctance to bargain for a two-year agreement into a conclusion that the parties were simply not making progress, even though there had been only two bargaining sessions in which the possibility of a two-year agreement had been a subject of discussion. The district's negotiators adjourned the bargaining session of February 5, 2004, without responding to the union's request to set a new meeting and without telling the union's team they were leaving. The district then declined to engage in further face-to-face negotiations, and all further bargaining was conducted through a mediator.

The district's efforts to blame the union for the frustration of the negotiations and the "spin" that Cummings put on the events were not credible. Cummings testified that the district contacted her because of a difficult bargaining session in the fall of 2003, which was uncharacteristic for the district. Further, she stated that the district had always been able to settle its contracts with the union before the end of school in the spring or immediately afterward. She was then forced to concede on cross-examination that the agreement for the 2001-02 school year was finalized on November 20, 2001 and for the 2002-03 school year on February 25, 2003, far past the time frame she testified to. She also testified that the reason for the cancellation of November sessions was administrative error on the part of the district in failing to post the meetings, and that there were documents in the record on this point. However, the documents in the record on the failure to post a meeting related to a negotiation session in September, not to cancelled meetings in November.

The district also claimed the union was responsible for seeking to negotiate a two-year contract. However, the union did not request to bargain a two-year contract. It simply notified the district in accordance with the reopener language of the 2002-03 agreement that it wanted to bargain about the 2004-05 school year. Its representatives told the district's representatives more that once that they had not intended to bargain the two years simultaneously, and that they believed to do so would make it more difficult to reach agreement for the 2003-04 year. The district

continued to press for a two-year agreement despite the protests of the union, and despite the bargaining history of the parties of one-year agreements. Cummings testified that the district "pleaded with" the union for its proposals for language items for the second year of a contract at the January 8, 2004, negotiation session, but that the union was unable to provide them. This should not have been surprising to the district since all negotiations to that point had been for a one-year contract, and the district raised the issue for the first time on January 8, 2004.

The district claimed it raised the issue of retroactivity due to a concern that if the contract was not settled by the end of the fiscal year, funds that were available to pay retroactive pay increases would revert to the state. However, the district raised the issue of retroactivity in January 2004, yet Skinner testified that the conversations about the potential loss of funds if the contract were not settled occurred in April 2004, several months afterward.

The district also attempted to blame the union for the failure of communication that resulted in the conclusion of the negotiating session on February 5, 2004, without setting a date for further negotiations and the request for mediation assistance from the Board that followed. Gigstad testified that, in a sidebar meeting with Cummings, he proposed February 23, 2004, to resume negotiations. In electronic mail correspondence between Cummings and Gigstad on February 26 and 27, 2004, Cummings denied that Gigstad proposed a date to continue negotiations. However, Cummings's notes of the February 5, 2004, session conclude with notes of her discussion with Gigstad and state, "Feb 23rd March 2 pot" suggesting that February 23 and March 2 had been identified as potential negotiation dates. Cummings's notes corroborate Gigstad's version of these events, and the most likely scenario is that the district's negotiators left without responding to the union's proposal to continue negotiations on February 23, 2004.

The tactics of the district after October 31, 2003, indicate an intent to frustrate the bargaining process. This course of conduct amounted to a failure on the part of the district to bargain in good faith, which contributed to the inability of the parties to arrive at a collective bargaining agreement. Most importantly, the insertion of a new proposal for a two-year agreement by the district after the parties had been bargaining for 7 months for a one-year agreement is evidence of bad faith on the part of the district. *Quality House of Graphics, Inc. Local One-l* (2001), 336 NLRB 497. For this reason, even if the parties were at genuine impasse on April 13, 2004, that impasse resulted from the district's bad faith bargaining and was not valid for purposes of implementing changes in the terms and conditions of employment.

The district also attempted to attribute the failure to achieve agreement to the union's failure to make a counter proposal to the district's last, best and final offer. It claimed that it did not implement the changes in working conditions until April 30, 2004 in order to give the union time to make additional proposals. However, in making the last, best and final offer, the district signaled quite clearly that it did not intend to negotiate further. The terms of the offer itself gave Local 3182 until April 30, 2004, to *ratify* the offer, not to make a new counteroffer. Further, when the union proposed additional negotiations, the district's response made it clear it did not contemplate additional negotiations ("understand that we have exhausted our parameters").

Further, even if the parties had been at valid impasse, the district's implementation of a change in the Article 7.1 language in a manner that varied materially from its bargaining position, and refusal to bargain over the 2004-05 school year constituted failures to bargain in good faith.

After bargaining to impasse, an employer may make unilateral changes that are reasonably comprehended within the employer's pre-impasse proposals. *American Federation of Television and Radio Artists v. NLRB* (D.C. Cir. 1968), 395 F.2d 622. The language change to Article 7.1 implemented by the district was not reasonably comprehended within the employer's earlier proposals. All of the district's proposals and supposals on this subject starting with the January 8, 2004, bargaining session offered to grandfather teachers hired before the 2004-2005 school year. The district's last, best and final offer was regressive on this point in that it did not contain a grandfather provision, and was therefore not reasonably contemplated by the district's proposal prior to its declaration of impasse. Thus, it was an illegal unilateral change.

Once the district had implemented the changed conditions of employment for the 2003-04 school year, it still had an obligation to bargain in good faith about terms and conditions of employment to be effective in the future. The district's position that it had somehow implemented or imposed an "agreement" to be applicable for a two-year period reflects a fundamental misunderstanding by the district about what it had in fact done and the effect of its actions. The district implemented its unilateral changes for the 2003-04 school year on April 30, 2004. It did not implement its unilateral changes for the 2004-05 school year until approximately four months later, at the commencement of the 2004-05 school year. It had a continuing obligation to bargain about future terms and conditions of employment. As the U.S. Supreme Court stated in *Charles D. Bonanno Linen Serv. v. NLRB* (1982), 454 U.S. 404, 412:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force."

See also *Gulf States Mfg., Inc. v. NLRB* (5th Cir. 1983), 704 F.2d 1390, 1399. Local 3182 proposed its language change items for 2004-05 on June 22, 2004. The union's failure to produce these had been a sticking point for the district in the failure to resolve the earlier negotiations. With the start of school still several months away, certainly the parties should have been able to continue productive negotiations. However, the district unlawfully considered itself to have no further bargaining obligations.

In connection with the contention that it had no obligation to bargain further with the union, the district contends that it had an "implied contract in fact" with the union. It bases this contention on an assertion that Local 3182 accepted the terms of the last, best and final offer, as demonstrated by the fact that Marchant requested teachers' retroactive pay to be paid in separate checks, and by the fact that the union members accepted the increase in pay. The cases cited by the district, involving actions to enforce implied agreements under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, are inapposite to the facts in this dispute. In *McNealy v. Caterpillar Inc.* (7th Cir. 1998), 139 F.3d 1113, 1122, for example, the court stated: "When a unilateral implementation is the foundation for an implied-in-fact [collective bargaining agreement], the Eighth Circuit requires proof of acceptance 'over and above the fact that the union members continued to work.'" The court in *McNealy* found the requisite proof in the fact that the union recessed a strike so that its members could return to work. In this case we have only the fact that the union members continued to work and be paid.

Even if the parties could be said to have an implied contract, it is unclear from the district's contentions what the effect of that contract would be on this unfair labor practice charge. It cites nothing in the implied contract that would operate as a defense to the unfair labor practice charge. To the extent that the district implies that it was relieved of its bargaining obligations because the union had impliedly accepted a two-year contract, that position is without merit.

Mont. Code Ann. § 39-31-406(4) provides that when the Board finds that an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. In this case, the

appropriate remedy for the district's failure to bargain in good faith is an injunction against making unilateral changes in terms and conditions of employment, recission of the unilateral changes to Articles 7.1 and 9.2, an order to resume bargaining at the request of the union, and a posting requirement.

The district maintains that if the Board finds that the district committed an unfair labor practice, it must order a return to the *status quo ante*. Therefore, it contends the Board must order the members of Local 3182 to repay the salary increases unilaterally paid to them by the district. Although a return to the *status quo ante* is a proper remedy in many cases involving unilateral changes by the employer, when the employer has increased the wages of union members or otherwise made a change that is beneficial to union members, that remedy is proper only when requested by the union. *McClatchy Newspapers, Inc. d/b/a The Fresno Bee* (2003), 339 NLRB No. 158, at 13. Local 3182 has not requested recission of the pay increases. Such an order under the facts of this case would certainly not effectuate the policies of the Act, and is therefore not proper. Whether the pay increases should be rescinded can be a subject of the bargaining required by this order. Recission of the language changes made to the collective bargaining agreement is proper, and the district must also retroactively apply Articles 7.1 and 9.2 as appropriate. Finally, individual employees of the district are entitled to have any leave used to participate in the hearing of this matter reinstated.

VI. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. A public employer may not refuse to bargain collectively in good faith on questions of wages, hours, fringe benefits, and other conditions of employment with an exclusive representative of its employees. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5). An employer that makes unilateral changes during the course of a collective bargaining relationship concerning wages, hours, fringe benefits, and other conditions of employment, without first bargaining to impasse, has refused to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.

3. On April 30, 2004, St. Ignatius School District No. 28 made unilateral changes for the 2003-04 school year and announced its intent to make changes for the 2004-05 school year in the terms and conditions of employment of its employees

whose exclusive representative for collective bargaining purposes is St. Ignatius Local Chapter No. 3182, without bargaining to impasse.

4. Even when an impasse exists, unilateral changes made by an employer are illegal if the employer's failure to bargain in good faith contributes to the impasse. St. Ignatius School District No. 28 engaged in a course of conduct that frustrated negotiations, was not good faith bargaining, and tainted any resulting impasse for purposes of being able to implement unilateral changes. The unilateral changes were therefore unlawful.

5. Even when an impasse exists, unilateral changes made by the employer must be reasonably comprehended by its pre-impasse proposals. In effecting a unilateral change to the language of Article 7.1 of the 2002-03 collective bargaining agreement between the parties that did not grandfather existing staff, St. Ignatius School District No. 28 made a change that was not reasonably comprehended by its pre-impasse proposals and was therefore unlawful.

6. After announcing its intent to effect unilateral changes for the 2004-05 school year, St. Ignatius School District No. 28 then refused to bargain further about the terms and conditions of employment of its employees represented by St. Ignatius Local Chapter No. 3182 for that year, in violation of its obligation to bargain in good faith.

7. By unilaterally implementing changes in the terms and conditions of its employees who were members of the bargaining unit represented by St. Ignatius Local Chapter No. 3182 without bargaining to a valid impasse, by engaging in a course of conduct designed to frustrate bargaining, by making unilateral changes not reasonably contemplated by its pre-impasse proposals, and by refusing to bargain about terms and conditions of employment to be implemented in a succeeding school year, St. Ignatius School District No. 28 violated Mont. Code Ann. § 39-31-401(1) and (5).

8. St. Ignatius Local Chapter No. 3182 did not accept the terms of the last, best and final offer made by St. Ignatius School District No. 28 when its members continued to work and be paid, or when the union requested that the retroactive pay contemplated by the last, best and final offer be paid in a particular manner. The union and the district did not have an implied contract as a result of these acts.

9. As a result of the unfair labor practices committed by St. Ignatius School District No. 28, the St. Ignatius Local Chapter No. 3182 is entitled to an order to the district to cease and desist making unilateral changes in terms and conditions of

employment in the absence of a valid impasse, to cease and desist actions designed to frustrate the collective bargaining process, to rescind the unilateral changes to Articles 7.1 and 9.2 of the 2002-03 collective bargaining agreement between the parties, to apply the provisions of Articles 7.1 and 9.2 in the 2002-03 collective bargaining agreement retroactively to any employees affected by the unilateral change, to resume bargaining in good faith for the 2003-04 and 2004-05 school years at the request of the union, to reinstate any leave used by members of the union to participate in the hearing of this matter, and to post and publish the notice set forth in Appendix A.

VII. **RECOMMENDED ORDER**

St. Ignatius School District No. 28 is hereby **ORDERED**:

1. To cease immediately the practices of unilaterally altering terms and conditions of employment without bargaining to impasse with the St. Ignatius Local Chapter No. 3182, bargaining in bad faith, implementing unilateral changes not reasonably comprehended by pre-impasse proposals, and refusing to bargain about terms and conditions of employment; and

2. Within 30 days of this order, to take the following affirmative action necessary to effectuate the policies of the Act:

a. On request of the union, resume bargaining in good faith with St. Ignatius Local Chapter No. 3182 over the terms and conditions of employment of its members;

b. Rescind the unilateral changes to Articles 7.1 and 9.2 of the 2002-03 collective bargaining agreement between the parties and apply the provisions of Articles 7.1 and 9.2 retroactively to any employees affected by the unilateral change;

c. Reinstate all leave taken by members of St. Ignatius Local Chapter No. 3182 to participate in these proceedings;

d. To post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, at St. Ignatius school for a period of 60 days while school is in session and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

DATED this 14th day of June, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Chief
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than July 7, 2005. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

The Montana Board of Personnel Appeals has found that St. Ignatius School District No. 28 violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

We will not fail to bargain in good faith with the St. Ignatius Local Chapter No. 3182, MEA/MFT;

We will not unilaterally change the terms and conditions of employment of employees covered by the collective bargaining agreement with St. Ignatius Local Chapter No. 3182, MEA/MFT, without bargaining to valid impasse;

We will not rescind the pay increases granted to members of St. Ignatius Local Chapter No. 3182 for the 2003-04 and 2004-05 school years but we will rescind all other changes to the terms and conditions of employment made on April 30, 2004;

We will bargain in good faith with St. Ignatius Local Chapter No. 3182, MEA/MFT, about the 2003-04 and 2004-05 school years and succeeding years;

We will reinstate all leave taken by members of St. Ignatius Local Chapter No. 3182, MEA/MFT to participate in the hearing of ULP Case No. 32-2004.

DATED this _____ day of June, 2005.

ST. IGNATIUS SCHOOL DISTRICT NO. 28

By:_____